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Funding State Courts--Finding Opportunity in Crisis

I am Paul De Muniz, Chief Justice of the Oregon Supreme Court. Oregon has a unified court system so I am also the administrative head of the courts in my state. I want to thank the American Bar Association for forming and supporting the Task Force on Preservation of the Judicial System. Your inquiry is timely and important at this point in our country's legal and judicial history. It is very much an honor to appear before such a distinguished panel. My remarks today are focused in three areas: (1) the current condition of our state courts; (2) defining adequate state court funding; and, finally, (3) what can and should be done to secure the best opportunity to achieve adequate state court funding.

Our State Courts Today

Let me begin with the current condition of our state courts. State courts today have changed dramatically from those of the 19th century, when all that legislative and executive branches needed to fund were judicial salaries, a horse and a borrowed room. Modern state courts do more today than they have ever done before, and they do so in systems that have fully evolved as concrete branches of state government rather than diffuse parts of a theoretical construct. One hundred years ago, state judiciaries existed primarily as loosely-connected collections of locally-funded county and municipal courts. Within those systems, courts of last resort wielded a certain degree of power as the entities responsible for interpreting state statutes and constitutions; they commonly lacked, however, any administrative authority over the courts that operated below them. The last 60 years have seen states implement so-called "modern court" provisions that have melded state court systems into structured administrative entities, often led by the state's highest court or its chief justice.

At the same time, state courts have developed – and are administering – a growing array of specialized services that range from providing mediation and arbitration services, to solving specific community problems in non-traditional adjudicatory forums such as drug courts, family courts, mental health courts and now – in many states – veteran's courts. The states, in turn, have made wholesale changes in the way they fund their courts by shifting fiscal responsibility for the judiciary away from local governments and placing it with state government; 31 state court systems currently rely on state appropriations for most, if not all of their budgets. My state is one of those unified court systems – a court system funded almost entirely by the state.

Consequently, modern state courts – and state court leaders – increasingly view themselves as operating within a system devoted to a collective constitutional purpose. In Oregon, for example, that purpose is defined by the state constitution as the administration of justice "openly and without purchase, completely and without delay [.]". Today, it is more important than ever before that state courts pursue that particular mission – or one phrased much like it – with an enhanced sense of constitutional identity, administrative definition, and influence. Moreover, we must pursue it with a firsthand knowledge of how badly the administration of justice is destabilized when legislatively imposed budget reductions resulting from recessionary cycles force state court functions to be routinely turned off and on like tap water.

Presently, 49 states are facing, or will soon face, severe revenue shortfalls in their current and coming fiscal year budgets, with revenue gaps predicted to last through the decade. As responsible partners in government, state courts must accept their obligation to share in the fiscal reductions necessary to balance a state's budget. However, revenue shortfalls in many states are so great that proposed cuts to judicial budgets can imperil the judiciary's constitutional responsibility to administer justice impartially, completely and without delay.

The economic crisis that currently plagues most state economies today is fueling the demand for state court services while at the same time subjecting state courts to ever-deepening budget cuts. For state courts, the renewed deficits translate into another round of hard economic times. Here are several examples among many from around the country. California's judicial budget was reduced by \$256 million in fiscal year 2008-09. The budget was then reduced by over \$500 million in fiscal year 2009-10. All California state courts were closed on the third Wednesday of each month between September 2009 and July 2010, and Governor Jerry Brown has now proposed a permanent \$200 million reduction in California's judicial branch budget.

Due to severe budget cuts in Minnesota, the state judiciary has instituted a hiring freeze that has left judicial vacancies empty and has implemented voluntary furlough and separation incentive programs. Public counters are now closed half a day a week in over half of the state's judicial districts. They have terminated civil arbitration services in some judicial districts, suspended visitation services in others, reduced funding for drug courts statewide, halted funding for family court, and reduced staffing in domestic abuse service centers.

More than two dozen states have imposed court hiring freezes, and 11 states have put staff on unpaid furloughs of varying length. Court staff, including clerks, court interpreters and security personnel, have been eliminated or reduced. In Maine, magnetic security machines at local courthouses are no longer regularly manned. In at least 11 states, judicial compensation has been reduced.

If this continued underfunding of state courts is not reversed, it will cause severe and unacceptable delay in processing civil cases, ultimately driving civil litigants from our courtrooms to alternatives such as reference judges, arbitration and mediation. In doing so, it will, in effect, create two systems of justice: one for those who can afford alternative dispute resolution methods and one for those who cannot.

That division, however, belies the important role that a state's highest court plays in regulating business and consumer interests, especially today, as governmental regulatory bodies routinely fail to keep pace with contemporary discovery and innovation in science and technology. Disputes over issues arising in those areas are increasingly determined in court and they should be. However, the kind of regulatory authority established by case law and the kind of planning and risk analysis that economic litigation facilitates for business communities throughout the states is simply not present in alternative dispute methods – a loss at a time when it is needed most.

There is a second negative effect on the administration of justice when the civil justice system is crippled in state courts. Forcing courts to prioritize case processing by focusing on criminal cases at the expense of civil cases will eventually have a significant impact on the recruitment and retention of quality lawyers to the state court bench. Not only will lawyers be deterred from judicial service by low judicial salaries, but they will also be deterred by the lack of a diverse docket of interesting and challenging work. We must ask ourselves, how many talented legal minds will be interested in a judicial career in which the daily work load consists of criminal cases – mostly pleas and sentencing – and cases involving self-represented litigants? Very few, I suspect.

As a result of budget reductions, most state judiciaries have emptied their cupboards, swept the spare change from under their cushions, and thinned their soup. In a speech delivered in February of 2008 to the American Bar Association House of Delegates, Margaret Marshall, then chief justice of Massachusetts and President of the Conference of Chief Justices, noted that 95 percent of all litigation in the United States takes place in state courts and, that as a result, as justice in our state courts goes, so goes justice in our nation. According to Chief Justice Marshall, “our state courts are in crisis, a perfect storm of circumstances threatens much that we know, or think we know about our American system of justice.”

It is important to gain some understanding of how the state courts came to be in such dire circumstances. Obviously, there are a variety of contributing factors and this forum presents neither the time nor the place to identify all of them. However, at least one observation should be made relating to the structure of state government. In most states, the legislature has not only underfunded the courts for years, it has also underfunded itself by denying legislators the kind of staff and research support necessary to facilitate mastery of state government complexities that create a foundation for setting informed public policy. As a result, it is difficult for citizen legislators to gain a thorough understanding of the operations and budgets of executive branch agencies, or that of the judicial branch. Consequently, in charting a course of budget reductions in recessionary times, legislators tend to rely heavily on recommendations from the permanent unelected staff that staff the legislative budget office. Unfortunately, that often results in budget recommendations that treat the judicial branch as just one of many “agencies” slated to receive across-the-board budget cuts. Over-reliance on fiscal staff to create a formula approach creates the risk that policy decisions made by state legislators no longer drive state budgets; instead the budget recommendations of unelected staff end up driving the public policy of the state. This fiscal office approach may balance the budget in an easily explainable manner – however, that office neither has, nor takes responsibility in the end for the severe policy repercussions and consequences of following that course of action.

The judicial branch is, of course, not an agency like a state's department of corrections, human services, or its highway department. Those agencies, when faced with across-the-board cuts that represent a fixed percentage of their budgets, can choose not to pursue capital improvements or other tangible projects in order to meet their required budget reductions. In most states, however, 85 percent or more of the judicial branch budget is personnel costs, and – for important constitutional reasons relating to the separation of powers doctrine – judicial compensation generally cannot be reduced so the reductions fall more heavily on the remaining operations budget. As a result, wholesale budget cuts tend to have a disproportionate and, in some cases, crippling effect on a state's judicial branch, ignoring the role that courts play as the hub of the wheel for legal actions by all government players and the economy.

Additionally, fewer and fewer state legislatures today have a large cohort of lawyers among their membership, men and women familiar with the importance of maintaining an adequately funded judiciary. Instead, most legislators have had little or no contact with the court system in their state. In many ways, legislators today tend to reflect the attitudes and perceptions of the general public, who, lacking knowledge of our courts, are often upset by court decisions compelled by the law because segments of the media have portrayed those decisions as exercises in “judicial activism” or attempts at frustrating the people's will. Indeed, legislators at the national and state level have been heard to identify the three branches of government as the Executive, the Senate and the House. Education of others on the role and purpose of the courts cannot be underestimated as a major influence on how budgeting priority and policies are applied

What I have just described are two realities that cannot be ignored in any effort to achieve adequate funding for the state courts.

Adequate Funding for Justice Provides Meaningful – Not Just Mechanical-- Due Process

You often hear that court systems need to be funded at an “adequate” level to carry out their responsibilities in a timely and constitutional manner, ensuring that they are open and accessible and can administer justice completely and without delay. Yet “adequate” funding is usually defined at the barest, most basic level – can a court dispense due process in disposing of the cases before it in a manner that meets the minimum constitutional or statutory muster. Even given that low a threshold however, the dollars necessary to meet it are simply not guaranteed in these critical financial times. Courts are closed, court services are sharply curtailed or eliminated, court dockets are severely backlogged, and people suffer without recourse or justice.

Infusing the minimum level of dollars into our courts to fund a minimum level of functioning is like keeping a dying tree propped up in your yard so the landscaping will still look “normal” to passersby: it is little more than a façade. The cornerstone of democracy, the rule of law, cannot survive with this meager mindset as its measuring stick. A definition of an “adequate” level of funding for the courts must recognize both the duty of the court system in how it provides justice without delay and, additionally, it must encompass the responsibility of sustaining a viable separate branch of government – the judicial branch.

For a court system to meaningfully provide due process and timely justice as intended and deserved in a democracy, it must be able to do more than provide lip service in meeting the minimums of a mechanical process. Our courts must be funded, supported and shaped so that they can provide the best avenues to deliver the best outcomes for justice as required by the type of case, the matter or the people appearing before it.

The advent and development of court systems using outcome-based performance measures is consistent with that view. Adequate investment in our court systems should be viewed as that which is required to provide appropriate venues and alternatives for traditional adjudication, including offering or arranging self-help and mediation services. The development and funding for different approaches to case management, such as providing “treatment courts” processes for certain criminal cases or offering expedited civil jury trial options, should be viewed as delivering meaningful services in a manner that is necessary to serve the individual and community as “justice.” Often integrated and differentiated case management approaches are considered to be disposable “hobby” programs turned on and off at the funding faucet because they are outside the definition of traditional “justice” (*i.e.* to meet the ‘technical’ requirements). When you go to the doctor, an aspirin prescribed for every ailment, minor or major, is not considered adequate care. Courts need to be funded and expected to provide services procedurally proportionate and responsive to the seriousness and urgency of the matters before it. Courts should not be reduced to offering a one-flavor-only-stand-in-line ticket for “justice” that depends on the level at which the courts are funded that year or that day.

In that same context, the judicial branch of government must be funded at a sustainable level. “Sustainable” meaning not just enough to dispense justice daily, but to do so as a separate branch of government that has meaningful resources to manage, analyze, develop and plan for, implementing both short term and long term activities and strategies for supporting its role today while ensuring quality performance and improvement for the future. To do so, the judicial branch of state government must be able to:

- attract and retain a high level of quality candidates to serve as judges;
- attract and retain a quality workforce;

- plan and provide efficient and effective administration of justice in both an infrastructure and adjudicative capacity;
- provide access and timely justice consistent with founding constitutional principles, in a manner that is responsive to the people and the society whose rights it is designed and designated to protect.

The price of justice is the price of freedom. The definition of an adequate budget for the judicial branch is one that will allow our courts to provide access and meaningful – not just mechanical – due process every day.

Addressing the problems of insufficient staff resources exacerbated by insufficient funding for the courts must involve both short and long term solutions using investments in technology. No less is expected by a population that uses that same technology every day and has no patience or time for what is still considered the “court norm” – reams of paper, pens, and searches for missing paper files or delayed entry of judgments. No less is required of any business today that expects to remain viable and relevant as well as solvent. Courts must now move forward quickly on the heels of, if not the wheels of, technological opportunities to support and improve its work processes.

In the short term, anything that provides a way for the public or court staffs to easily access frequently asked questions and information on a website reduces repetitive telephone calls or foot traffic for what should otherwise be readily available information (*e.g.* court location and hours, daily court dockets, and frequently used forms). Any program or software that reduces the manual entry – especially the repetitive manual entry – of data by court clerks saves time and resources, and reduces error. Those types of solutions, however, can be ephemeral.

Meaningful, significant, and permanent advancements in the quality, timeliness and accessibility of court services while using fewer resources requires planning and investment in the overall technology infrastructure of a state court system on an enterprise level. Ideally, a unified court system can accomplish this on a statewide basis, providing even greater opportunities for leveraging resources and services.

An integrated technology approach allows planning that incorporates the major components of electronic filing and payment, electronic document and case management, person-based data, video conferencing, wireless connectivity and a robust web-based presence. Having just a fraction of that capacity, however will allow reengineering the delivery of court services to provide more complete information in real-time, offer immediate self-service opportunity unhampered by “business hours” or staff availability, and provide options that aren’t restricted by physical location or geography. It will also create a “common language” for a court system’s clientele, providing broader access and consistent processes. In its most expansive applications, it can make staff support and judicial resources available to lawyers and to the public on a regional or statewide basis, reducing delay and backlogs. Whether it is a centralized system for payment or information, or having a judge immediately available from elsewhere in the state for an emergency hearing, technology investments are the only meaningful way to do both “more” and “better” with fewer resources. The lawyers practicing in the states have an obligation to help provide leadership and support for their court systems and these technological improvement initiatives.

While an integrated technology approach to court business will allow courts to update the delivery of court services in significant ways, it is but the tool shed for the house itself, the house that needs an overall blueprint to guide its “repair” or “remodeling” effort. The term for that blueprint has most commonly been referred to as “reengineering.” Numerous state executive branches, and now several state judiciaries, are involved in this effort, actively questioning the what, why, where, and how of

the functions they perform, while searching for better ways to deliver quality services with fewer resources, given the long term recovery predicted for state economies. Reengineering is less about what we can "cut" and more about answering the question of how can we reshape and reform how we do our work in a permanently reduced organizational manner.

The reengineering blueprint must have well-defined underlying foundational elements that articulate the courts' mission, its institutional values, its internal governance structure and a vision with a strategic plan for improvement. In Oregon our court reengineering workgroup, dubbed "CREW," has adopted guiding principles for recommending reengineering proposals. Such proposals must:

Promote convenience for litigants;

- Reduce cost and complexity of judicial processes;
- Maintain or improve access to justice;
- Improve case predictability.

Under Oregon's current court reengineering efforts, we are not only examining how technology can remove current physical barriers; we are also, on a more radical note, examining how to break outmoded barriers created by precedential institutional structures, such as boundaries for venue and jurisdiction, the conduct of judicial business, internal communication, case assignment and case management. The CREWS review and recommendations regarding those changes will be issued in a report later this month.

The Legislative and Executive Branches Should Give State Court Funding a High Priority

State legislative and executive branches should give the adequate judicial branch funding the same priority afforded the education of our children, the health of our families, and the public safety of our communities. That is so for two related reasons.

First, of course, there is a legal argument. No state court system should be placed in the same situation as the State of New Hampshire, where a group of unrelated litigants is suing the legislature to restore funding to the courts so they can get their individual cases decided in a timely manner. Although courts have inherent power to compel certain actions by the legislature, state legislatures should not put the judicial branch in the position of having to decide for itself whether it has been funded at constitutionally adequate levels. That situation is an invitation to constitutional chaos, and can easily be avoided.

The second reason is a more practical one. Courts should have funding priority because courts stand at the intersection of each and every important social, political, and economic issue in each and every state. If you are interested in human services, for example, you know that no child removed from his or her home by the state is placed in foster care or returned home without a court's permission, and that courts oversee appointment of guardians and conservators for those unable to fully care for themselves.

If you are interested in public safety, you know that, every day, courts protect victims of stalking and domestic violence, turn lives around in drug courts, and enforce the rights of crime victims and criminal defendants as they adjudicate criminal matters.